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Chairman: Mr. Gómez Robledo ..... (Mexico)

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The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Mr. McRae** (Canada), commenting on the suitability of placing the most-favoured-nation clause on the Commission's long-term programme of work, said that, although policy differences preventing the adoption of earlier articles on the topic had still not been resolved, developments in the situation since 1978 had created an environment where consideration of that topic might prove more fruitful.

2. The most-favoured-nation clause had its foundation not only in ancient treaties, but also in more recent agreements which applied the notion to goods, investments and even trade in services. That conceptual evolution alone provided fertile ground for further analysis.

3. World Trade Organization (WTO) and bilateral investment agreements provided for dispute settlement; hence a body of jurisprudence related to the most-favoured-nation principle was emerging. The case law of WTO panels and its Appellate Body, as well as that of the International Centre for Settlement of Investment Disputes and other investment tribunals, all provided further material for reflection. Whether the non-discrimination principle inherent in the notion of the most-favoured nation applied in the same way in the different areas of trade, investment and services was a serious question facing Canada in the context of investment disputes under chapter 11 of the North American Free Trade Agreement (NAFTA). An elucidation of the scope of the most-favoured-nation obligation might be of immense value to newer and smaller States which were currently entering into bilateral investment agreements, but which did not have the resources to undertake a comprehensive analysis themselves.

4. While the concept of most-favoured nation had historically been related to the fields of trade and investment, it also resonated within the broader sphere of international law. Its similarities with and dissimilarities from the principle of non-discrimination in other branches of international law would benefit from the Commission's careful consideration. The most-favoured-nation principle fundamentally sought to prevent discrimination as between foreigners. The relationship between the principle of non-discrimination and the related principle of national treatment aimed at preventing discrimination between foreigners and nationals was extremely interesting. Similarly, the relationship between varying standards of non-discrimination and notions of an international minimum standard of treatment ought to be investigated as well. Any examination of the most-favoured-nation principle would involve a study of how different branches of international law related to each other and thus it would, in a sense, constitute a specific application of the Commission's work on fragmentation.

5. The Commission should therefore give serious consideration to the inclusion of the topic in its long-term work programme in order that it might focus on an area with practical implications whenever States concluded and applied treaties affecting their economic affairs. Its inclusion would also be in keeping with the Commission's own traditions in the codification and progressive development of international law, where it combined and adapted the practice and learning of the past with current needs, thereby contributing to the building of a responsive and coherent legal order.

6. The Commission had demonstrated a welcome flexibility in its treatment of the topic of international liability in respect of transboundary harm arising out of hazardous activities, in that it had proposed that the principles it had drafted on the allocation of loss in the event of such harm should be adopted in a General Assembly resolution recommending that States should pursue national and international action to implement those principles. Many of the provisions represented desirable practice for States to follow, rather than an agreed state of international law. The commentaries were rich in detail and testified to the thoroughness of the Special Rapporteur and the Commission.

7. Nevertheless the notion of "significant damage" might be ambiguous; the explanation in paragraph (1) of the commentary to draft principle 2 that the term "significant" was designed to prevent "frivolous or vexatious claims" suggested a relatively low threshold. On the other hand, paragraph (2) of the commentary stated that "[T]he harm must lead to a real detrimental effect" on human health or property. That wording implied a rather higher threshold. That divergence could possibly lead to wide discrepancies in the application of the principles.

8. Disparities in the level of the threshold might result in a distinction being drawn between the rights of victims injured as a result of transboundary harm within the State of origin and the rights of victims outside the State of origin, who might be compensated only in respect of "significant harm". Although the draft principles were grounded in the notion of setting an international minimum standard, if the difference between national treatment and the international minimum standard was too great, claims about discriminatory treatment might have some substance since, if the threshold was low, such discrimination might not exist, but if the threshold was high it might.

9. The idea of a precautionary principle was apparently gaining recognition among States. The draft principles had, however, wisely set out obligations of compensation and response rather than attempting to resolve the more theoretical issue of the status of the notion of "precaution". Ultimately the way the principles proposed by the Commission were applied in State practice might settle that issue.

10. **Mr. Hernes** (Norway), speaking also on behalf of the Nordic countries Denmark, Finland, Iceland, Norway and Sweden, said that the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities were a significant step forward in the development of international law on civil liability. They supplemented the rules on prevention and the articles on State responsibility for damage to the environment of other States and areas beyond the limits of national jurisdiction. Liability rules played an important role as far as compensation for victims was concerned and they provided an incentive for the prevention of damage. The draft principles laid down a minimum standard which should be taken into account when formulating further rules on liability in multilateral legal instruments, including those concerning the environment.

11. The principles were general in nature, which meant that their effective implementation would require the adoption of detailed national and international rules and regulations. It would, however, have been difficult for the Commission to proceed much further than it had done. Continued cooperation was therefore necessary between States in various forums.

12. The polluter-pays principle must guide the implementation of draft principle 4 and it was also of relevance when the threshold of "significant damage" was applied. That term set a standard which should be interpreted in the light of scientific developments, the precautionary principle and the development of international environmental law. Although a standard lower than "significant damage" would have been preferable, the Commission had judiciously rejected proposals for a higher threshold.

13. The principles supplemented the responsibility of States under international law, but did not in any way replace or reduce it. On that understanding, the draft principles should be endorsed in a General Assembly resolution and their speedy implementation ought to be encouraged. The draft articles on prevention of transboundary harm from hazardous activities ought to be adopted in conjunction with the draft principles on liability.

14. **Mr. Medrek** (Morocco) said that the International Law Commission's fifty-eighth session had been particularly productive. Its achievements had included the adoption of a set of draft articles on diplomatic protection, an issue which was linked to the responsibility of States for internationally wrongful acts. The text regulated in a balanced manner the conditions for the admissibility of diplomatic action and mostly reflected customary international law on the matter. Developments in contemporary international law had affected the scope of diplomatic protection and the conditions for its exercise. Some noticeable improvements had been made to the text of the draft articles during the second reading.

15. The new, more open-ended, wording of draft article 1, which did not answer the question of whether a State was acting in its own right, or on behalf of the individual, or both, was more attractive. Draft article 2 reaffirmed the principle established in the dictum of the Permanent Court of International Justice in the *Mavrommatis Palestinian Concessions* case, but the principle had been rendered more flexible to take account of changes of nationality and to cover stateless persons and refugees. The incorporation in draft article 8 of the phrase "in accordance with internationally accepted standards" had introduced a wider standard extending to persons who would not all come within the scope of the 1951 Convention relating to the Status of Refugees and the Protocol thereto.

16. His Government agreed with the scope of the provisions on diplomatic protection and with the idea

that it was for the State of nationality, at its discretion, to exercise diplomatic protection on behalf of its nationals, no matter whether they were legal or natural persons, if they had been injured by an internationally wrongful act of another State. It also supported the Commission's position on continuous nationality and likewise held that a State was entitled to exercise diplomatic protection on behalf of a natural person who had been a national of that State continuously from the date of injury to the date of the official presentation of the claim.

17. The new formulation of draft article 9 had clarified which State could be deemed the State of nationality of a corporation for the purposes of exercising diplomatic protection. As for draft articles 11 and 12, it was a moot point whether it was advisable to go further than the findings of the International Court of Justice in the *Barcelona Traction* case. The protection given to shareholders in a corporation was too generous, bearing in mind the rapid changes which could occur in share ownership in the modern international economy.

18. The provisions of draft article 14 were commendable and fully in line with the ruling of the International Court of Justice in the *Interhandel* and *Elettronica Sicula S.p.A. (ELSI)* cases. He expressed support for the first exception listed in subparagraph (a) of draft article 15 and welcomed the amendments made to subparagraphs (c) and (d) of that draft article. It would be advisable to defer any decision on the adoption of an international convention on diplomatic protection until States had had enough time to examine the draft articles in depth.

19. The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities would be a useful guide which would contribute to the development of international law in that field, since it dealt with hazardous activities not yet covered by specific bilateral, regional or international arrangements. While the provisions of draft principle 3 were perfectly acceptable, the Special Rapporteur's analysis of the term "significant damage" was somewhat ambiguous. The General Assembly should adopt a resolution embodying the draft principles and urging States to take national and international actions to implement them.

20. The General Assembly ought to revive its tradition of referring subjects of relevance to the international community to the International Law Commission for their codification and progressive development.

21. **Mr. Bhata** (India), endorsing the International Law Commission's approach to the topic of diplomatic protection, said that the draft articles affirmed the customary rules of international law that a State had a right, rather than an obligation, to exercise diplomatic protection and that a State could exercise diplomatic protection only in favour of its nationals. Draft article 5 on continuous nationality was important because, if a person changed their nationality, the dates and periods relevant to the determination of continuous nationality were crucial when deciding whether diplomatic protection could be exercised. The provision on multiple nationality was in line with the customary principle of international law upheld by the International Court of Justice in the *Nottebohm* case. As for draft article 11, the injuries of all shareholders, whether domestic of foreign, must have equal status and the purpose of any exercise in diplomatic protection should be solely to ensure compensation that was no less prompt and adequate than that given to national shareholders. The scope of draft article 13 was too wide and therefore required further careful examination.

22. The draft articles could form the basis of a binding legal instrument and ought to be taken up the following year, along with the topic of the responsibility of States for internationally wrongful acts, as the two subjects were interrelated.

23. The Commission had basically made the right choice in respect of the topic of international liability in the case of loss from transboundary harm arising out of hazardous activities, in that it had decided that the regime should be general and residual and allow States enough flexibility to fashion specific rules on liability in particular sectors of activity. In any set of provisions governing liability, or the allocation of loss, the operator should bear primary liability as that person was in command and control of the activity in question and therefore had a duty to redress any harm caused. While some States favoured civil liability regimes which were largely sectoral in nature, strict liability regimes were preferable for hazardous activities, since there were a number of other actors which should share the operator's responsibility. It was to be hoped that States would take national and international actions to implement the draft principles.

24. **Mr. Seger** (Switzerland) said that it was most useful to recall and summarize the international legal rules relating to diplomatic protection. By and large, the International Law Commission had drawn the right conclusions in that connection. However, he wondered whether an instrument codifying the law on diplomatic protection was pertinent in contemporary international law. The current situation had indeed changed dramatically since the early years when the individual had had no place in the international legal order. Since then, a clear trend had emerged towards recognizing the fact that natural and legal persons had the legal capacity to assert their rights directly before international courts, by virtue of conventions drawn up for that very purpose. Many bilateral investment treaties provided that disputes between investors and the host State could be submitted to the arbitration of the International Centre for Settlement of Investment Disputes. Moreover, in several regions of the world, individuals could secure the protection of their fundamental rights through international courts. Was it therefore necessary for States parties to the European Convention on Human Rights to turn to classical diplomatic protection in order to safeguard rights covered by the Convention? Admittedly such instruments did not exist everywhere, or did not always function and diplomatic protection was sometimes therefore the only remedy. Yet, in view of the conventional framework which States offered individuals, diplomatic protection was tending to become a subsidiary means to which recourse was had only when the legal or natural persons concerned had no possibility of asserting their rights in their own right.

25. The commentary had made it plain that the chief purpose of the draft articles on diplomatic protection was to protect corporations qua legal persons and, through them, their investments. Yet diplomatic protection was often hard to exercise with respect to international corporations, because identifying the nationality of a corporation was becoming increasingly complicated. As a result of globalization, corporations saw themselves more and more as multinational, or transnational, entities whose connection with a particular State could alter and was sometimes guided by economic opportunism. To what extent should a State still engage in the international defence of the interests of a corporation whose "national" character had almost disappeared?

26. The aim of those questions was not to cast doubt on the value of diplomatic protection as an instrument for defending legal persons' rights against a State which flouted them. Diplomatic protection was, however, a right, not an obligation, of a State. The customary nature of that right could not be called into question and no international convention on diplomatic protection must weaken that customary right. The draft articles should specify more clearly that that customary right was unaffected, so as to avoid giving the impression that, in the future, the exercise of diplomatic protection would be conditional upon the ratification of that convention.

27. Switzerland's practice was to refrain from giving a person holding dual nationality diplomatic protection against his or her other State of origin. On the other hand, it took the criterion of predominant nationality into account, if it was called upon to afford a person with dual nationality diplomatic protection against a third State. The Swiss authorities normally granted diplomatic protection only to persons with predominantly Swiss nationality. Draft articles 6 and 7 therefore constituted a relaxation of the conditions regarding nationality and offered States a wider opportunity to provide protection, if they so wished.

28. His Government was in favour of permitting the exercise of diplomatic protection in favour of stateless persons and refugees. The requirement that they should be "lawfully resident" was, however, superfluous for, in practice, no State would grant diplomatic protection to a stateless person or refugee who did not satisfy the requirements of the law. That factor would be meaningful only as grounds for objection on the part of the requested State and therefore seemed somewhat artificial.

29. The definition of the nationality of a corporation set forth in draft article 9 posed more of a problem. While it was possible to accept the theory that the law under which a corporation was incorporated was a factor determining the nationality of a corporation, the principle of control ought to be retained as an alternative criterion. Draft article 9 did allow some exceptions to the principle it laid down, subject to some strict and cumulative conditions. Even if the theory on which it was based had the merit of being clear, because normally it was easy to determine under what law a corporation had been set up, it established a formal, rather than a substantive, connection with the State which was supposed to defend the corporation's

interests through diplomatic protection. As an enterprise could comprise several corporations in various countries, it might be hard to ascertain which State was competent to exercise diplomatic protection. Furthermore the location of a corporation's head office could change fast. In view of the increasingly volatile nature of the geographical and economic links between corporations and their host States, the draft articles ought to be amended in order to permit the State which was ultimately going to represent a corporation in an international dispute to require a more substantial connection with that corporation. Control over a corporation would create such a connection because it protected persons with an economic stake in the corporation. Another determining factor might be the location of the effective economic activities of a corporation, because it was in that State that the corporation created jobs and paid its taxes.

30. Draft article 19 corresponded to current Swiss practice, but the advisability of inserting such a provision in a convention was questionable, since the draft article in question dealt with a question of municipal law, whereas the set of draft articles as a whole was devoted to the conditions for exercising diplomatic protection between States. Moreover, for the sake of coherence, it would be preferable for the draft articles not to contain both binding rules and non-binding recommendations.

31. A period of reflection was required for a thorough discussion of the substance and form of the draft articles on diplomatic protection. The relationship between the measures taken to secure diplomatic protection and the articles on the responsibility of States for internationally wrongful acts should also be studied in greater depth, especially with regard to lawful countermeasures when diplomatic action and other methods of peaceful settlement had failed to resolve the dispute generating the request for diplomatic protection.

32. **Mr. Hernández García** (Mexico) said that for his country diplomatic protection, including safeguarding the rights of all its nationals, was a central feature of foreign policy. The Commission's work on diplomatic protection was highly relevant for the progressive development of international law, given the close and obvious link between that topic and State responsibility, and its connection with the question of the treatment of aliens. In general terms, he found the draft articles to be an acceptable outcome of the past session's work on the topic, and he supported the Commission's recommendation for preparing a convention on that basis. The General Assembly would, he hoped, decide on the convening of a working group to consider the draft articles with that end in view.

33. His delegation was especially interested in the question of the exhaustion of local remedies. On the rule concerning exceptions, set out in draft article 15, he believed that it was for the State against which a claim was brought to show that local remedies had not been exhausted, and to specify which remedies remained open to the claimant. If avenues of redress still remained, the burden of proving an exception to the rule of exhaustion should pass to the claimant.

34. Diplomatic protection was the right of the State of nationality, to be exercised in accordance with draft article 1. The text of draft article 1 was, however, formulated in such a way as to leave open the question whether the State exercising diplomatic protection did so in its own right or that of its national, or both. The individual concerned was therefore, apparently, the subject of a number of primary rules of international law which protected him against his own Government and, when abroad, against foreign governments. That placed him in a better position than in the past to determine the scope of diplomatic protection. The recommendation in draft article 19 that States should take into account the views of injured persons with regard to resort to diplomatic protection and reparation became relevant in that light. The right to diplomatic protection could be limited by other rules of international law, such as treaty provisions for the protection of investments, referred to in draft article 17, or an express declaration by investors that they would not resort to the diplomatic protection of their governments, by means of the so-called "Calvo Clause". Aspects of the topic of diplomatic protection on which delegations had commented could be examined in greater depth within a working group established by a decision of the General Assembly.

35. Turning to the question of international liability in case of loss from transboundary harm arising out of hazardous activities, he said that the activities generated by scientific and technological progress posed particular risks to the environment and to natural resources. International liability for such risks was not dependent on the existence of fault. It arose from a primary obligation of the State of origin to assume

liability for acts occurring on its territory, by whomsoever they were carried out. His delegation had always advocated an integral approach to the topic and the Commission had, rightly, dealt first with the prevention aspect, on which it had provided a set of draft articles which, his delegation agreed, should form the basis of a convention. It was therefore surprised that the Commission had presented its work on the second and fundamental part of the topic, namely that relating to liability, in the form of draft principles. The substantive content of "principles" was bound to be more general than that of "articles" of a future convention, and that would have a negative impact on the regime to be established. The current procedure was unjustified, given that in 2001 the Commission had prepared the articles on international responsibility for internationally wrongful acts, as well as the draft articles on prevention of transboundary harm from hazardous activities. Since the draft currently before the Committee was of limited scope and did not offer an integral solution to the question of international liability, his delegation would not wish it to be adopted as a convention without prior consideration of the topic by some intergovernmental body. The draft should preferably be reviewed, bearing in mind the interrelationship between prevention and liability to which General Assembly resolution 56/82 referred, in order to produce a text reflecting the importance of ensuring the protection and preservation of the environment.

36. In the preamble to the draft principles, the liability regime which followed from a failure of prevention appeared to differ from that which followed from the damage and loss inflicted on the victim. The seventh preambular paragraph noted "that States are responsible for infringements of their obligations of prevention under international law", but the fifth preambular paragraph and draft principle 4 dealt only with compensation for victims incurring harm or loss as a result of hazardous activities (liability). His delegation took the view that the State should nevertheless be made responsible in such cases, and that liability should not be placed solely on the operator or other entity, as stated in draft principle 4, paragraph 2. States of origin should bear at least residual liability when they failed to prevent environmental damage, because hazardous activities which might have an adverse impact on the environment were deemed to be authorized by them. He agreed, however, that proof of the hazardous nature of the activities should not be required from an innocent victim of damage, and that the regime decided upon should be one of strict liability. The operator should be required, as proposed in draft principle 4, to provide insurance, bonds or other financial guarantees to ensure that compensation could be paid in the event of transboundary damage resulting from its activities. In that connection, the environmental and other criteria laid down in the Principles for Responsible Investment launched by the Secretary-General of the United Nations should be borne in mind. As for response measures, those specified in draft principle 5 would make it possible to identify the obligations arising for the State of origin, together with the role to be played by other parties, if an incident occurred. It would be desirable to develop specific international regimes for certain categories of hazardous activities, but not at the price of forgoing the adoption of general rules applicable to all cases.

37. The question of expulsion of aliens, to be considered by the Commission at its next session, was closely bound up with the protection of human rights. It was vital to develop a consistent legal regime, which would entail considering all aspects of the question. Despite certain existing general principles which were uncontroversial, such as the right of States to expel aliens whose presence they considered undesirable for national security reasons, or the general prohibition against mass expulsions, international law had yet to settle other, more controversial aspects of the topic. Certain general principles could be derived from existing international instruments, such as those relating to human trafficking or the smuggling of migrants, or from bilateral agreements on repatriation. All the rules in the existing instruments were based on certain understandings, such as the human right of trafficked persons to return to their countries of origin and to be accepted there, and respect for due process and the safety and dignity of the human person. States did not have an unqualified right to expel aliens, and any discussion based on the understanding that they did would be of questionable validity. The limits to their discretion in the matter should be properly defined in international law.

38. **Mr. Ojo** (Nigeria) said that to avoid inconsistency, the definition of diplomatic protection in article 1 of the Commission's draft should immediately mention the exceptions provided for in draft articles 3, paragraph 2, and 8. He therefore suggested including in

draft article 1, after "a national of the former State", the phrase "or to other persons in accordance with the present draft articles". In draft article 8, paragraph 3, the provision made for diplomatic protection for refugees and stateless persons was excluded where the internationally wrongful act had been committed by the State of nationality of the refugee. That might amount to double jeopardy for a refugee from a State which had flagrantly breached his fundamental freedoms. Some redrafting might therefore be needed for draft article 8. Under draft article 9, a corporation controlled by nationals of a State other than the State of incorporation would have the nationality of the persons in question, leaving out of account any situation in which the relocation of a business and its seat of management itself constituted the injury for which diplomatic protection was needed. The draft article should be reworded to prevent such an anomaly. He supported the Commission's recommendation for a convention on diplomatic protection, but considered that more time was needed for delegations to consider the draft articles.

39. He expressed preliminary general agreement with the draft articles on international liability in case of loss from transboundary harm arising out of hazardous activities. However, more time was needed to study them in depth.

40. Concerning the topics to be chosen for the Commission's long-term programme of work, he supported the inclusion of the question of the immunity of State officials from foreign criminal jurisdiction. His delegation was confident that due priority would be given to the need for State officials to enjoy such immunity, for the sake of stable relations among States. He also supported the inclusion of the other four topics proposed by the Commission for future study.

41. **Ms. Pino Rivero** (Cuba) said the draft articles on diplomatic protection were a significant contribution to the codification and progressive development of international law, combining a number of scattered customary rules and developing others which were not yet being uniformly applied. The definition in draft article 1 made it clear that diplomatic protection was a right, but not a duty, of the State of nationality. Her delegation fully supported the provisions in draft article 5 requiring continuous nationality on the part of injured natural persons, and those in draft article 8 extending diplomatic protection to stateless persons and refugees. She also supported the formulation in draft article 14 on the exhaustion of local remedies, and the practice recommended for States in draft article 19. In a world where, as a result of international trade and tourism, people were constantly on the move from one country to another, diplomatic protection was increasingly important and the applicable rules were in need of codification. Her delegation therefore supported the Commission's recommendation for an international convention on the subject.

42. **Mr. Khan** (Pakistan) said the draft articles on diplomatic protection were a sound compilation of the rules of customary international law on the subject. He agreed with the definition in draft article 1, which was drawn from the broader context of State responsibility for wrongful acts. He also agreed with the thrust of draft article 7, on multiple nationality, but felt it would be appropriate to lay down agreed parameters for "predominant" nationality, a concept not otherwise found in international law.

43. The requirement in draft article 14 for the exhaustion of local remedies raised the question of the differing nature of local remedies from one State to another, some being rudimentary and others comprehensive in nature. It was even possible that some local remedies could be used to avoid invoking diplomatic protection. His delegation preferred to consider that aspect further before taking a final position.

44. In draft article 19 (c), the notion of "reasonable deductions" by the State of nationality from compensation transferred to the injured person was essentially ambiguous. It could be manipulated or lead to exaggerated assessments by claimant States. The notes to draft article 19 should recommend a clearer framework for such deductions.

45. His delegation took the view that more time was needed to consider the draft articles before beginning work to prepare a convention on the topic. He suggested that the General Assembly should take note of the draft articles at the current stage, leaving the work of drafting a convention to a later stage.

46. His delegation welcomed the work done by the Commission on the topic of international liability for injurious consequences arising out of acts not prohibited by international law, and the development of the draft principles on international liability in case of loss from transboundary harm arising out of hazardous activities. The draft principles set out an essential list

of measures needed in order to protect potential victims, and provided a basis for establishing international liability for transboundary harm. He supported the definition of damage in draft principle 2 as "significant", and the scope given to the term "environment" to include natural resources, both abiotic and biotic. The definition of "hazardous activity" in draft principle 2 was likewise appropriate. While supporting the compensation mechanism proposed in draft principle 4, he recommended including within the principle a provision for a third-party damage assessment mechanism, to settle disputes relating to the claims arising from incidents of damage. He endorsed the suggestion by the delegation of China that an international fund should be established to pay the compensation. However, such a fund should not act to limit the liability of the "operator", as defined in draft principle 2.

47. Lastly, he supported the Commission's recommendation that the General Assembly should endorse the draft principles by a resolution and urge States to take national and international action to implement them.

48. **Ms. Beeckman** (Observer for the International Federation of Red Cross and Red Crescent Societies), speaking on the Commission's long-term programme of work with special reference to the topic of protection of persons in the event of disasters, said that in the past few decades the world community had witnessed a sharp increase in both the number and the impact of non-armed conflict disasters. As the largest humanitarian network, the International Federation of Red Cross and Red Crescent Societies (IFRC) had always been committed to ensuring that those affected by disasters, particularly the most vulnerable, received the necessary relief in a timely, effective and well-coordinated manner. Although most natural disasters could be successfully addressed by domestic authorities and civil society, some exceeded national coping capacities and required international assistance. In such cases, adequate regulatory frameworks were essential to guarantee the speed and effectiveness of overall disaster response.

49. Before they could bring aid to disaster victims, international providers of humanitarian relief often faced obstacles in the import of relief goods and equipment; delayed or refused entry of relief personnel; difficulty in obtaining recognition of professional qualifications or work permits for relief workers; inability to acquire a national legal personality; problems with the use of vehicles and aircraft; and taxes, fees and tolls. Affected Governments, on the other hand, frequently complained of inappropriate aid, untrained or incompetent international relief workers, disrespect for cultural traditions or local capacity and failure to coordinate. All such challenges caused delays, added subsidiary costs and affected the ability of aid workers to provide life-saving assistance in humanitarian emergencies. Although some were not legal problems per se, appropriate regulatory frameworks could help in addressing them.

50. The Federation had long been instrumental in the development and promotion of standards, guidelines and recommendations in that field, including the measures to expedite emergency relief adopted in 1977 by the International Conference of the Red Cross and Red Crescent and the United Nations Economic and Social Council, the Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief adopted in 1994 and the Sphere Project Humanitarian Charter and Minimum Standards in Disaster Response, developed in 2000.

51. In its constitutional role as a coordinator of disaster response, the Federation had set up the International Disaster Response Laws, Rules and Principles (IDRL) programme in 2001 to reduce the suffering of people affected by non-armed conflict disasters by raising awareness, promoting implementation and strengthening the laws, rules and principles that would ensure timely, adequate and efficient international response to disasters. The IDRL programme had compiled and analysed existing international and national legal instruments pertaining to international assistance to non-armed conflict disasters. Its research indicated that at the international level the regulatory framework for international response to disasters was disparate and composed of heterogeneous instruments of varying weight, reach and substantive scope. Moreover, international laws, rules and principles were insufficiently known and applied at the national level. National disaster management legislation rarely addressed the issue of how international aid would be initiated, facilitated, coordinated and regulated. In the absence of adequate disaster preparedness, ordinary legislation not adapted to the needs of a disaster situation often continued to

be applied. Ad hoc measures were usually not well disseminated and were frequently revised. In other cases, the sheer number of international actors tended to overwhelm rather than complement domestic response mechanisms.

52. The initial findings had been endorsed by the twenty-eighth International Conference of the Red Cross and Red Crescent, which had adopted its Agenda for Humanitarian Action to lead collaborative efforts in research and advocacy on IDRL questions. The IDRL programme has developed a publicly available IDRL searchable database, carried out further case studies, organized workshops and surveyed the various stakeholders. In the coming year, the Federation would complete a comprehensive study of the matter and launch a series of high-level regional consultations on the drafting of a declaration of principles, for presentation to the Conference in 2007, to serve as a guide for the development of the critically required national legislation in the field.

53. The Federation warmly welcomed the timely interest manifested by the Commission in including the topic of protection of persons in the event of disasters in its long-term programme of work and would of course consider inputs from the Commission in its 2007 recommendations. The Commission could be assured of the Federation's support in its future work on the topic. Unlike international humanitarian law, international law applicable to natural disasters was relatively fragmented and undeveloped, and steps to codify it could save lives and alleviate human suffering.

Statement by the President of the International Court of Justice

54. **The Chairman**, welcoming the President of the International Court of Justice, said that the Committee members were aware of her great interest in their work; they in turn were keen observers of the Court's activities and greatly admired its work. The decisions of the Court were invaluable for States and the Committee as a means of determining the rules of international law, and in its advisory role the Court was invaluable to the United Nations. The Committee looked forward to the continuing dialogue.

55. **Ms. Higgins** (President of the International Court of Justice) said that the Committee's work on the development and codification of international law was of the highest importance to the International Court of Justice. As for the work of the Court, it was accessible to all via its website, a new updated, expanded and interactive version of which would be launched shortly.

56. Without repeating the information on the Court's activities during the past annual reporting period just presented to the General Assembly and contained in the Court's report (A/61/4), she would like to share some thoughts on a relatively recent phenomenon: the increasing importance of remedies as an issue of litigation at the International Court of Justice. The determination of an appropriate remedy was integral to the Court's role in the peaceful settlement of a dispute and formed the link between the judicial phase and the post-judicial implementation of the judgment. It was the concrete outcome of the litigation, which the parties would have to explain to their domestic audiences.

57. The only reference to it in the Statute of the Court was to be found in article 36, paragraph 2 (d), which provided that States parties might declare that they recognized the compulsory jurisdiction of the Court with regard, inter alia to "the nature or extent of the reparation to be made for the breach of an international obligation". Beyond that, and subject to any specific remedies requested in a special agreement of the parties, the issue of remedies was in principle left to the discretion of the Court. However, to a significant extent the Court was in the hands of the parties. It was to the final submissions put to the Court on the closing day of hearings that the Court must reply, and what the parties were asking the Court to find was becoming increasingly complex. For many years, it had been usual for the applicant State to ask simply for a declaration of a breach of an obligation by the other party, so that a short and uncomplicated *dispositif* would suffice. But since coming to the Court in 1995 she had noticed that very detailed findings of diverse points of law were required, and the declaration of the substantive violation was less frequently found to be a sufficient remedy in and of itself.

58. An important preliminary point that must always be determined was the scope of the Court's competence to deal with requests for remedies. Where the Court was applying or interpreting a particular treaty, the question had been raised whether some separate head of jurisdiction was needed to specify a remedy for any breach of the treaty. In the *LaGrand* case (*Germany v. United States of America*), the United States had argued

that certain remedies sought by Germany formed part of the law of State responsibility and were thus outside the treaty concerned. The Court had made it clear that no separate basis for jurisdiction was required for the Court to consider the remedies a party had requested for the breach of an obligation. The same argument had been raised and the same response given in the case concerning *Avena and other Mexican Nationals (Mexico v. United States of America)*.

59. Assuming there was no jurisdictional hurdle, the Court had to determine how much freedom it had in fashioning remedies and how the "appropriate" remedy was to be ascertained. In the *LaGrand* case, the United States had argued that an apology was regarded as the appropriate remedy for a violation of article 36 of the Vienna Convention on Consular Relations; however, the Court had not seen any clear pattern of State practice in that regard and had not accepted that argument.

60. Nor had it accepted the Applicant's argument that the remedies should include a guarantee or assurance of non-repetition of the illegal acts. Such a remedy caused major evidentiary problems for a court, raising the question of what evidence was sufficient to show the likelihood that a breach would occur again in the future, whether such evidence must relate to the nationals of the Applicant in the case, from whom the evidence should emanate, at what stage of the litigation it should be produced and to what tests it should be subjected. To date the Court had treated requests for guarantees of non-repetition with considerable caution. In the *LaGrand* case the Court had considered that the commitment expressed by the United States to ensure implementation of its obligations under article 36, paragraph 1 (b), of the Vienna Convention on Consular Relations must be regarded as meeting Germany's request for a general assurance of non-repetition. In the *Avena* case the Court had applied similar reasoning, observing that the United States had been making considerable efforts to ensure that its law enforcement authorities provided consular information to every arrested person they knew or had reason to believe was a foreign national. The Court had also declined to order guarantees of non-repetition in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)* for different reasons. Each State had claimed that its military was lawfully present in the Bakassi Peninsula; with the clarification by the Court as to where title lay, the Court had not been prepared to envisage a situation where either party, after withdrawing from the other's territory, would fail to respect the territorial sovereignty of that party.

61. The Court had also not accepted the requested remedy of the annulment of illegal acts where not appropriate in the circumstances of the case. In the *Avena* case, Mexico had argued that the proper remedy for a conviction against the background of a violation of the Vienna Convention on Consular Relations was annulment, essentially requesting the Court to open the prison door. However, the Court had held that it was not the conviction and sentences of the 52 Mexico nationals, but rather certain preceding breaches of treaty obligations, that constituted the violation of international law, so that the partial or total annulment of the conviction or sentence was not the appropriate remedy.

62. In the *LaGrand* and *Avena* cases the Court had ultimately fashioned its own remedy. In the *LaGrand* case it had determined that the United States should, by means of its own choosing, allow the review and reconsideration of the conviction and sentences by taking account of the violation of the rights set forth in the Vienna Convention. In the *Avena* case it had revisited that remedy, holding that the special clemency procedure being used was not sufficient in itself, although it could perform a supplementary role. States parties were asking the Court for an ever wider range of remedies, but ultimately it was the Court that decided the appropriate remedy for each case.

63. For some types of violations, compensation would appear to be the appropriate remedy, but the issues regarding compensation were so complex that it had become customary to leave the quantification of damages to a second round, should there be a failure of the parties to reach an agreement based on the judgment. Constantly in the Court's mind was the question of how many findings of specific facts it must make at the merits phase in order to have in place what might be necessary at a later compensation phase. Often, in order to keep a complex case operationally manageable, the litigation case was "broad-brush". In the *Cameroon v. Nigeria* case, the Applicant had taken a global approach to the claim of "unlawful occupation" rather than asking for findings on specific incidents. In the *Congo v. Uganda* case, The Applicant had used specific incidents as examples, but the Court had been led to believe that any further claim of

compensation would be with respect to the overall situation. Moreover, the Applicant in that case had prudently reserved the nature, form and amount of compensation to another phase, and the Court had encouraged the parties to seek an agreed solution bilaterally, in good faith, on the basis of its findings in the judgment. Such questions as how to quantify compensation for an unlawful military action or the compensation value of an occupation of a part of the territory could be best answered in a negotiated agreement between the parties.

64. Some States seemed to think that in order to obtain a determination by the Court as to a particular remedy it was necessary to ask for a separate finding that responsibility had been incurred as a consequence of a breach. However, a party could ask for a remedy for a violation without a formal, separate finding of responsibility, as had been the clear practice in a long line of cases. That practice was consistent with what the Court had said in the *Temple of Preah Vihear* case (*Cambodia v. Thailand*), namely, that a request for an order of restitution was "implicit in, and consequential on, the claim of sovereignty itself".

65. The Court had never yet made a finding that a State's responsibility was engaged in a case that mainly focused on territorial title, as, for example, *Cameroon v. Nigeria*. A separate finding of responsibility could be valuable in cases where the attribution of unlawful conduct to a Government was a key issue, but even in such cases it was not always needed as a "stepping-stone" between illegality and remedy. Parties to many such cases had asked the Court for a finding of a breach of a specific obligation coupled with a request for compensation or another remedy, without requesting a separate finding of State responsibility. The latter would require separate pleadings and a detailed examination of the law of responsibility, thus adding expense and time for all involved. Given the busy docket of the Court, asking it to take that extra step would have real implications for its efficiency.

66. The developments she had mentioned in the realm of remedies had added to the complexities of the Court's work. The field of remedies had expanded far beyond the issuance of simple declarations of a breach of an international obligation. The Court must clarify the jurisdictional basis, disentangle the concepts of illegality and responsibility and work towards a realistic approach to remedies that best utilized the strengths of the Court and best served the interests of the parties.

67. **Mr. Lehmann** (Denmark) said that in the *Passage through the Great Belt* case between Finland and Denmark (1991), the Court had welcomed negotiation between the parties with a view to a friendly settlement. He wished to know whether the President of the Court considered it to be necessary, possible or advantageous for the Court to make itself available to the parties during the proceedings for the purposes of an out-of-court settlement. That would be helpful in view of its heavy workload.

68. **Ms. Higgins** (President of the International Court of Justice) said that when the Court was entrusted with a case, it was required to give a legal answer to the issues placed before it, provided that they were within its jurisdiction; to do otherwise would be an abnegation of its duty. In the case referred to, which came within an uncertain area of law, the fact that the Court had not considered it warranted to indicate provisional measures had contributed to the feeling that an agreed solution needed to be sought. As far as she was aware, no circumstance had ever arisen in the course of the Court's proceedings such that one or more of the parties might deem it not in its interest to push for a conclusion. If, however, the parties were to come to the President with the request that the Court make itself available to them for the purposes of a friendly settlement, then that would be an interesting avenue to explore.

69. **Mr. Bethlehem** (United Kingdom) asked whether the Court's procedures were adequate to deal with technical issues of assessment of compensation, considering that no specific expertise was normally available to it for that purpose. On a related matter, he wondered whether statements on remedies could be regarded as an intrusion into the domestic sphere. He noted the establishment of an increasing number of ad hoc tribunals, such as investment tribunals, whose judgments were considered to constitute such an intrusion.

70. **Ms. Higgins** (President of the International Court of Justice) said that within the Court there was considerable expertise in that regard by virtue of the previous experience of members of the bench; moreover, its rules provided for the use of experts, if necessary. In cases where the question of compensation could not be settled bilaterally, the Court would want to pursue the matter by all the means available to it.

The question of intrusion was a sensitive one, and nowhere more so than when domestic criminal justice systems were involved; the Court would always seek to intervene in domestic matters to the least possible extent.

71. **Mr. Kim** Sun-pyo (Republic of Korea) inquired about the Court's discretionary power in the determination of remedies. He asked whether its consideration of possible remedies was confined to the options proposed by the parties or whether it could also consider other options.

72. **Ms. Higgins** (President of the International Court of Justice) said that if, in the final submissions of the parties, the Court was requested to find in favour of a specific remedy, then it must consider that remedy and determine whether there were any reasons why it might not feel able to grant it; indeed it had no choice in the matter. However, once it had completed its consideration, it had the inherent discretion to review and reconsider the question and to fashion its own remedy, while taking care to intrude into the domestic system as little as possible.

73. **Mr. Hernández García** (Mexico) said that the President of the Court had given a concise but comprehensive presentation of the Court's criteria for determining compensation; he appreciated that it had to proceed on a case-by-case basis. It would nevertheless be useful to know what latitude it allowed itself. In the *Avena* case, it had not been the intention of Mexico to request the Court to open the prison door. It had held that the United States' violation of article 36 of the Vienna Convention on Consular Relations was a ground for annulment of the conviction of the 52 arrested persons. There was a causal connection between the violation of the treaty and the original conviction; that should be taken into account in the reparation. He expressed satisfaction with the Court's decision that the United States should review and reconsider the conviction against the background of the violation of the Vienna Convention, but would have wished that the Court take greater account of the causal connection.

74. **Ms. Higgins** (President of the International Court of Justice) said that, while she appreciated the views expressed by the representative of Mexico, she could not add any further comment to a judgment that had been passed. She had felt it appropriate to share the Court's thinking on the matter with the members of the Sixth Committee, but it would not be proper for her to say any more.

75. **Mr. Hmoud** (Jordan) said that notwithstanding the difficulty, mentioned by the President of the Court, of quantifying compensation in situations of military occupation, the Security Council had been able to do so, through its Compensation Commission. He wished to know whether the Court could order the establishment of another body or mechanism to determine compensation.

76. **Ms. Higgins** (President of the International Court of Justice) said that she could not answer the question hypothetically. The difficulty of quantifying compensation did not mean that the Court was incapable of doing so, whether through assistance or other means.

Agenda item 79: Report of the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization (*continued*) (A/C.6/61/L.6)

77. **Mr. Samy** (Egypt) said that 2006 marked the sixtieth anniversary of the inaugural sitting of the International Court of Justice and that the purpose of draft resolution A/C.6/61/L.6 was to commemorate that event. The Special Commission on the Charter of the United Nations had adopted the draft resolution at its 250th meeting and recommended its adoption. He was gratified to be able to introduce it in the presence of the President of the Court.

78. **Ms. Rivero** (Uruguay) said that the Spanish translation of operative paragraph 1 of the draft resolution contained an error: "*sinceramente*" was not an accurate rendering of "solemnly".

79. **The Chairman** said that, as a representative of a Spanish-speaking country, he agreed with the observation of the representative of Uruguay. The necessary change would be made.

80. *Draft resolution A/C.6/61/L.6 was adopted by acclamation.*

81. **Ms. Higgins** (President of the International Court of Justice) said that she was very touched by the fact that the Sixth Committee had chosen to adopt the resolution in her presence; it was an act of friendship towards the Court that would be greatly appreciated by all her colleagues. The tribute to the work of the Court would further inspire it in its continuing endeavours to assist to the best of its abilities in the peaceful settlement of international disputes.

The meeting rose at 1 p.m.